EDITOR'S NOTE

THE FOLLOWING PAGES WERE POOR HARD COPY AT THE TIME OF FILMING. IF AND WHEN A BETTER COPY CAN BE OBTAINED, A NEW FICHE WILL BE ISSUED.

87 720 (1)

Supreme Court, U.S.
FILED
SEP 9 1987
JOSEPH F. SPANIOL, JR.
CLERK

No. ____

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1987

ETHEL HAGEN, Executrix of the Estate of Oscar William Hagen,

Intervenor and Appellant,

vs.

DOUGLAS J. KANALY, PATRICK S. KONECHNE, DENNIS LIHS, ROBERT McBRIDE, DONALD VAN CLEAVE and JOSEPH W. WOLF,

Plaintiffs and Appellees,

vs.

STATE OF SOUTH DAKOTA, by and through its Governor, WILLIAM JANKLOW, and its Attorney General, MARK MEIERHENRY, THE SOUTH DAKOTA BOARD OF REGENTS, THE BOARD OF CHARITIES AND CORRECTIONS and THE COMMISSIONER OF SCHOOL AND PUBLIC LANDS,

Defendants and Appellees,

ROBERT R. WEBER and RAYMOND MARTINMAAS,

Intervenors.

ON APPEAL FROM THE
SUPREME COURT OF SOUTH DAKOTA

JURISDICTIONAL STATEMENT
(Amended)

CHARLES LACEY
1004 East 35th Street
Sioux Falls, South Dakota 57105
(605) 334-9322
Counsel for Appellant

99 P

Mr. Steven M. Johnson
Brady, Kabeiseman, Reade & Johnson
Attorneys at Law
200 West Third
P.O. Box 735
Yankton, SD 57078-0735
(605) 665-7468
Counsel for Plaintiffs

Ms. Celia Miner
Brady, Kabeiseman, Reade & Johnson
Attorneys at Law
200 West Third
P.O. Box 735
Yankton, SD 57078-0735
(605) 665-7468
Counsel for Plaintiffs

Roger Tellinghuisen
Attorney General
State Capitol
Pierre, SD 57501
(605) 773-3215
Counsel for Defendants

John Bastian
Assistant Attorney General
State Capitol
Pierre, SD 57501
(605) 773-3215
Counsel for Defendants

QUESTION PRESENTED

Is Chapter 138, South Dakota Session Laws of 1984 (S.B. 221) unconstitutional in that it is repugnant to the provisions of the North Dakota-South Dakota Enabling Act and would change the University of South Dakota at Springfield, a federal land grant college, into a prison?

Appellant does hereby withdraw her Questions Nos. 1, 3, 4, 5, and 6 of her first appeal, and No. 2 of her second appeal, and relies exclusively upon her rights on appeal.

LIST OF PARTIES

All of the parties appearing in the Supreme Court of South Dakota are as follows:

Appellant: Ethel Hagen, Intervenor;

Plaintiffs: Douglas J. Kanaly, Patrick S. Konechne, Dennis Lihs, Robert McBride, Donald Van Cleave, and Joseph W. Wolf;

Defendants: State of South Dakota, William J. Janklow, Governor (omitted), Mark Meierhenry, Attorney General (omitted), The South Dakota Board of Regents, The Board of Charities and Corrections, and John J. Gerken (omitted), Commissioner of School and Public Lands; and

Intervenors: Robert R. Weber and Raymond Martinmaas.

* * * TABLE OF CONTENTS * * *

Jurisdictional Statement

	Page
Question Presented	i
List of Parties	ii
Table of Authorities	v, vi
Jurisdictional Statement	1
Opinions Below	2
Grounds of Jurisdiction	3
Constitutional Provisions and Statutes	5
Statement of Case	5
The Question is Substantial	13
Conclusion	14
Appendix	
Chapter 101, Laws of Dakota, 1881	1a
North Dakota-South Dakota Enabling Act	1a
Chapter 163, South Dakota Session Laws of 1895	6a
Chapter 135, South Dakota Session Laws of 1971	10a
Order Permitting Intervention	19a

* * * TABLE OF CONTENTS * * *

Jurisdictional Statement

	Page
Order of Dismissal	22a
Memorandum Decision Re: Summary Judgment	24a
Amended Complaint of Interveners (No. 2)	30a
Memorandum Opinion of Circuit Court Judge Robert A. Miller, dated November 26, 1985	40a
Findings of Fact, Conclusions of Law, and Order	44a
Objections to Findings Fact and Conclusions of Law	49a
Notice of Appeal	53a
Appeal No. 15249	55a
Petition for Rehearing	57a
Judgment	62a
Notice of Appeal to the Supreme Court of the United States	64a
Notice of Appeal to the Supreme Court of the United States (2nd Appeal)	68a
Hagen Appeal to S.D. Supreme Court	73a

TABLE OF AUTHORITIES

Jurisdictional Statement

Cases:	Page
Baldridge v. Reid, 88 S.D. 374, 220 N.W.2d 532	9
Commercial Service Corporation of Dell Rapids v. L. Paulle-Midway Fixture and Show Case Co., 75 S.D. 409, 66 N.W.2d 253,	9
Ervien v. U.S. Arizona Enabling Act, 246 Fed. 279; 251 U.S. 41, 47; 64 L. Ed. 128, 130; 40 S.Ct. 75	1
Lassen v. Arizona (1967), 385 U.S. 458, 17 L. Ed. 2d 515	2
Kanaly, et al. v. State of South Dakota, 368 N.W.2d 819 (S.D. 1985)	3, 7
Kanaly et al v. State of South Dakota, 403 N.W.2d 33 (S.D. 1987)	3
Kane v. Kundert, 371 N.W.2d 172 (S.D. 1985)	13
Patrick et al. v. Blake, State Secretary of Finance, etc. 70 S.D. 494, 19 N.W.2d 220	2
Schoniger v. Logan, 40 S.D. 30, 166 N.W. 226; 43 S.D. 228, 178 N.W. 929	9
State ex rel. Bryant et al. v. Dolan, 61 S.D. 530, 249 N.W. 923	4
In re Opinion of the Judges, 61 S.D. 107, 246 N.W. 295 (1933)	13

Constitutional Provisions:

Article IV, §3, S.D. Constitution

Article VIII, §7, S.D. Constitution

Article VIII, §8, S.D. Constitution

Article XIV, §3, S.D. Constitution

Statutes:

North Dakota-South Dakota Enabling Act, Act of February 22, 1889, Ch. 180, 25 Statutes at Large

28 U.S.C. §1257 (2)

SDCL 15-1-1(1) (1984 Rev.)

SDCL 15-26A-4(2)

Ch. 163, S. D. Session Laws of 1895

Ch. 135, S.D. Session Laws of 1971

Ch. 138, S.D. Session Laws of 1984

JURISDICTIONAL STATEMENT

Ethel Hagen, The Appellant, appeals from the final Judgment of the Supreme Court of the State of South Dakota, App., p. 62a. dated March 25, 1987, and entered May 6, 1987, in the Office of the Clerk of Courts of Hughes County, South Dakota, affirming the Circuit Court's Judgment of Dismissal of Appellant's Complaint on the merits. The Complaint is shown at App. p. 30a.

Appellant's Petition for Rehearing was denied on April 30, 1987, and entered in the Office of the Clerk of Courts of Hughes County on May 6, 1987.

This appeal is taken pursuant to 28 U.S.C. §1257 (2).

We believe the following cases sustain jurisdiction for this appeal:

Ervien v. U.S. Arizona Enabling Act, 246 Fed. 279; 251 U.S. 41, 47; 64 L. Ed. 128, 130; 40 S.Ct. 75.

Lassen v. Arizona (1967), 385 U.S. 458, 17 L. Ed. 2d 515.

Patrick et al. v. Blake, State Secretary of Finance, etc. 70 S.D. 494, 19 N.W.2d 220.

OPINIONS BELOW

Memorandum Decision of Honorable Robert A. Miller, presiding Judge of the Sixth Judicial Circuit of South Dakota, Hughes County, not reported and not included in Appendix, dated July 10, 1984, (316-330).

Findings of Fact and Conclusion of Law and Order of Honorable Robert A. Miller, presiding Judge of the Sixth Judicial Circuit of South Dakota, Hughes County, not reported and not included in Appendix, dated August 13, 1984, (382-393).

Memorandum Decision Re: Summary Judgment, Honorable Robert A. Miller, presiding Judge of the Sixth Judicial Circuit of South Dakota, Hughes County, not reported, dated September 21, 1984,

(474-479). App. p. 24a

Letter Opinion, Honorable Robert A. Miller, dated November 26, 1985, not reported (686-687). App. p. 40a.

South Dakota Supreme Court: Kanaly et al v. State of South Dakota, by and through Janklow et al, reported at 368 N.W. 2d 819 (S.D. 1985).

South Dakota Supreme Court: Kanaly et al v. State of South Dakota, by and through Janklow et al, reported at 403 N.W. 2d 33 (S.D. 1987).

GROUNDS OF JURISDICTION

This is an action to have Chapter 138, South Dakota Session Laws of 1984 (S.B. 221) adjudged unconstitutional and void, and that the defendants be permanently enjoined from interfering with the continued operation of University of South Dakota at Springfield (USD/S).

The Judgment of the Supreme Court of South Dakota, dated March 25, 1987, and

entered in the Circuit Court on May 6, 1987, by its affirmance, HELD: S.B. 221 did not violate, and was not repugnant to the provisions of the North Dakota-South Dakota Enabling Act.

Appellant's first Notice of Appeal was filed on June 5, 1987, in the Office of the Clerk of Courts, Hughes County, South Dakota. The second Notice of Appeal was properly filed in the Office of the Clerk of the Supreme Court of South Dakota on July 27, 1987.

Chapter 163, South Dakota Sessions Laws of 1895 is inexorably connected with the Enabling Act. The two acts constitute a compact between the federal government and the sovereign people of the State of South Dakota each being bound, State ex rel. Bryant et al. v. Dolan, 61 S.D. 530, 249 N.W. 923, at page 926, last paragraphs. A trust is created and the United States is a party.

CONSTITUTIONAL PROVISIONS AND STATUTES

Article IV, §3, South Dakota Constitution.

Article VIII, §7, South Dakota Constitu - tion, reprinted at 4a.

Article VIII, §8, South Dakota Constitutional, reprinted at 5a.

Article XIV, §3, South Dakota Constitutional, reprinted at 5a.

North Dakota-South Dakota Enabling Act, Act of February 22, 1889, Ch. 180, 25 Statutes at Large, reprinted at 1a.

Chapter 163, South Dakota Session Laws of 1895, reprinted at 6a.

Chapter 101, South Dakota Sessions Laws of 1881, reprinted at 1a.

Chapter 135, South Dakota Session Laws of 1971, reprinted at 10a.

STATEMENT OF THE CASE

At the 59th Session of the South Dakota Legislature, two bills were presented pertaining to the dissolution of the University of South Dakota at Springfield.

The first, S.B. 105, failed to pass by a vote of 20 to 15. On reconsideration, S.B. 105 again failed to pass. On the last day of the session, the proponents of S.B. 221 succeeded in an effort to suspend the rules in both houses and passed S.B. 221.

S.B. 221 is an exact copy of S.B. 105, except for the addition of a provision for the sale of the University of South Dakota at Springfield.

The Intervenors commenced their action on August 14, 1984, to have S.B. 221 adjudged unconstitutional, void and for an injunction as Civ. No. 84-246 in the Hughes County Circuit Court by due service of the Summons and Complaint and additional due service of the Amended Summons and Complaint in that action. They represented the property interest of all taxpayers of the State of South Dakota and they had the right to dismiss one action for the purpose of transferring their causes of action or

claims to another Kanaly, et al. v. State, 368 N.W.2d 819 (S.D. 1985) (hereinafter referred to as Kanaly) in support of those Plaintiffs.

In all stages of the transfer, the Intervenors reserved their rights to their causes of action and claims which they could lose only by transfer, waiver, estoppel or laches, of which there is no evidence.

> SDCL §15-1-1(1) (1984 Rev.) * * * "An action is an ordinary proceeding in a court of justice, by which a party prosecutes another party for the enforcement, determination, or protection of a right, the redress or prevention of a wrong, or the punishment of a public offense. Every other remedy is a special proceeding; * * * ."

In all of the Intervenors' acts, in relation to the transfer of their causes of action and claims, Intervenors used the term "actions" in its correct meaning as appears in SDCL §15-1-1 (1) (1984 Rev.).

On September 17, 1984, a hearing on consolidation was held. Oscar W. Hagen,

Robert R. Weber and Raymond Martinmaas moved the Court for permission to intervene in the Kanaly action which had proceeded to a point where the Plaintiffs submitted a Certificate for Trial and the Defendants had interposed a Motion to Dismiss.

The Intervenors moved for permission to intervene in Kanaly. The Defendants consented on condition that the previous action of the movants be Dismissed With Prejudice. Hagen et al moved that such permission be granted without prejudice. The Court ruled:

> "The Court will allow plaintiffs in Springfield 3 to intervene as parties in case number 2 on the condition that they dismiss with prejudice their case. Upon the refusal to do that, they will not be allowed to intervene in case number 2."

Transcript September 17, 1984, Vol. 2 of 2, pg. 15.

On September 20, 1984, the Court signed its Orders to dismiss the previously

commenced action and to grant Hagen et al permission to intervene in the Kanaly action. App. p. 19a.

Neither of the Orders has been changed, modified or reversed. Copies of the Orders were duly served upon the Plaintiffs and the Defendants; Hagen, Weber and Martinmaas became Intervenors in the Kanaly action with all the rights of parties.

Commercial Service Corporation of Dell Rapids v. L. Paulle-Midway Fixture and Show Case Co., 75 S.D. 409, 66 N.W.2d 523.

Baldridge v. Reid, 88 S.D. 374, 220 N.W.2d 532.

Schoniger v. Logan, 40 S.D. 30, 166 N.W. 226; 43 S.D. 228, 178 N.W. 929.

In the Motion to Dismiss shown at Clerk's Index at p. 510-511, neither the Plaintiffs nor the Defendants served said Motion on the Intervenors and obtained no jurisdiction over them; there is no evidence that the Order entered in that proceeding

was made with the consent or knowledge of the Intervenors that such application had been made and an Order taken; in fact, actual fraud on the trial and appellate courts occurred.

The proof of these statements is found in the following language on pages 14-15 of Appellant's Brief, which language neither the Plaintiffs nor the Defendant denied and under the law of South Dakota must be held to have admitted:

> "On October 11, 1984, the Plaintiffs in Kanaly moved the Trial Court to Dismiss Without Prejudice the claims remaining unadjudicated as shown by Judge Miller's Memorandum Decision of September 21, 1984 (510).
>
> A letter from S. Johnson to Judge Miller, dated October 19, 1984, appears in the Record (512). The letter recites:
>
> 'This is to advise that the hearing scheduled for October 22, 1984, in the above-entitled matter has been rendered unnecessary by agreement of counsel. The Defendants do not contest our Motion to Dismiss which is really the only matter before the Court at this time. We will prepare an Order consistent

with our Motion and forward it to the Court and counsel in the very near future.'

No authority for the statements in the letter appears in the file, nor does any proof of advice to counsel appear.

The Certificate of Service (511) certifies that the Motion was mailed to each counsel appearing for the Defendants, but shows no such mailing or advice to the attorneys for Intervenors.

On October 22, 1984, counsel for the Intervenors, unaware of the action between Court and Counsel for the Plaintiffs, was driven from Sioux Falls to Pierre and appeared at the Trial Court's chambers for the Pretrial Motions hearing previously scheduled, where he was told that nothing further remained before the Court.

(Transcript, 11-26-85, p. 13, line 19 to p. 15, line 18.).

This Court's Opinion 368 N.W.2d 819 (S.D. 1985), p. 822, argued November 27, 1984, states:

* * * The trial court next entertained appellees' motion for summary judgment and held on September 2, 1984, that no genuine issue of material fact existed as to the constitutionality of S.B. 221 but that certain issues, later dismissed by plaintiffs, should be tried. Those issued dismissed, and thus not before this court were a) breach of employment contract rights, b) the

unlawful taking of private property, and c)due process considerations. It is from this partial summary judgment that appellants now appeal."

The Notice of Appeal in Kanaly was not served upon the Intervenors as required by SDCL 15-26A-4(2):

"Appeals of right - How taken. An appeal permitted by §15-26A-3 as of right shall be taken as follows: Service of the notice of appeal. The appellant, or his counsel, shall serve the notice of appeal on counsel of record of each party other than appellant, or, if a party is not represented by counsel, on the party at his last known address."

Said appeal is void.

Article XIV, §3 of the South Dakota Constitution confers control of the normal schools upon the Board of Regents. Article IV, §3 defines the power of the governor:

"The Governor shall be responsible for the faithful execution of the law. He may, by appropriate action or proceeding brought in the name of the state, enforce compliance with any constitutional or legislative mandate, or restrain violation of any unconstitutional or legislative power, duty or right by any officer,

> department or agency of the state or any of its civil divisions.

Kane v. Kundert (S.D. 1985) 371 N.W. 2d 172, at p. 174.

> When there is an affirmative constitutional mandate for legislative action at a certain specified time, there is an implied prohibition of action at any other time. In re Opinion of the Judges, 61 S.D. 107, 246 N.W. 295 (1933).

THE QUESTION IS SUBSTANTIAL

The life of a long proven state institution would be terminated.

Five other federal land grant education institutions in South Dakota would be subject to the same attack, to say nothing of those in other states.

The cherished traditions of a noble school would be lost.

The respect for law and the security of all people is directly involved.

CONCLUSION

For these reasons, this Court should note probable jurisdiction of this appeal.

Respectfully submitted,

CHARLES LACEY
A member of the Bar of
the Supreme Court of
the United States
1004 East 35th Street
Sioux Falls, SD 57105
(605)334-9322
Counsel for Appellant

PROOF OF SERVICE

I, CHARLES LACEY, attorney for the appellant, Ethel Hagen, herein and a member of the Bar of the Supreme Court of the United States, hereby certify that on the 30th day of October, 1987, I served copies of the foregoing Jurisdictional Statement on the several parties thereto by mailing copies in duly addressed envelopes, with first class postage prepaid, to their respective attorneys of record, as follows:

The Honorable George S. Mickelson
Governor of South Dakota
State Capitol
Pierre, SD 57501

Roger A. Tellinghuisen
Attorney General of South Dakota
State Capitol
Pierre, SD 57501

Mr. John Bastian
Assistant Attorney General
State Capitol
Pierre, SD 57501

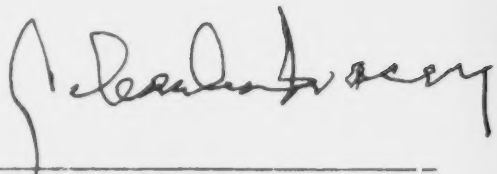
Mr. Steven M. Johnson
Attorney at Law
P.O. Box 735
Yankton, SD 57078

Proof of Service, continued:

Ms. Celia Miner
Attorney at Law
P.O. Box 735
Yankton, SD 57078

Mr. Robert R. Weber
Rural Route
Strandburg, SD 57265

Mr. Raymond Martinmaas
Mina
Aberdeen, SD 57001



CHARLES LACEY

APPENDIX

Chapter 101, Laws of Dakota, 1881:

The exclusive purpose of which shall be the instruction of persons, both male and female, in the art of teaching and in all the various branches that pertain to a good common school education; also to give instruction in the mechanical arts, and in husbandry and agricultural chemistry, in the fundamental laws of the United States, and in what regards the rights and duties of citizens.

The North Dakota-South Dakota Enabling Act, Act of February 22, 1889, Ch. 180, 25 Statutes at Large 676.

The fourth paragraph of § 11 provides: "* * * With the exception of the lands granted for public buildings, the proceeds from the sale and other permanent disposition of any of the said lands and from every part thereof, shall constitute

permanent funds for the support and maintenance of the public schools and the various state institutions for which the lands have been granted. Rentals on leased land, proceeds from the sale of timber and other crops, interest on deferred payments on land sold, interest on funds arising from these lands, and all other actual income, shall be available for the acquisition and construction of facilities, including the retirement of bonds authorized by law for such purposes, and for the maintenance and support of such schools and institutions.

* * *

The lands hereby granted shall not be subject to preemption, homestead entry, or any other entry under the land laws of the United States whether surveyed or unsurveyed, but shall be reserved for the purposes for which they have been granted."

"§14. * * * The schools, colleges and universities provided for in this act shall forever remain under the exclusive control of the said states, respectively, * * *."

"§17. * * * To the State of South Dakota: * * * for state normal school, eighty thousand acres; * * * and for such other educational and charitable purposes as the Legislature of said state may determine, one hundred seventy thousand acres; * * *."

And in the last paragraph of said § 17, the Enabling Act it is provided:

"And the lands granted by this section shall be held, appropriated, and disposed of exclusively for the purposes herein mentioned, in such manner as the legislatures of the respective states may severally provide."

Pursuant to and in conformity with the North Dakota-South Dakota Enabling Act, the sovereign people of the State of South Dakota adopted the following provisions in their Constitution on October 1, 1889, to wit:

Article VIII, § 7 of the South Dakota Constitution states as follows:

"All lands, money or other property donated, granted or received from the United States or any other source for a university, agricultural college, normal schools or other educational or charitable institution or purpose, and the proceeds of all such lands and other property so received from any source, shall be and remain perpetual funds, the interest and income of which, together with the rents of all such lands as may remain unsold, shall be inviolably appropriated and applied to the specific objects of the original grants or gifts. The principal of every such fund may be

increased, but shall never be diminished, and the interest and income only shall be used. Every such fund shall be deemed a trust fund held by the state, and the state shall make good all losses therefrom that shall in any manner occur."

Article VIII, §8 of the South Dakota Constitution states as follows:

"All lands mentioned in the preceding section shall be appraised and sold in the same manner and by the same officers and boards under the same limitations and subject to all the conditions as to price, sale and approval, provided above for the appraisal and sale of lands for the benefit of public schools, but a distinct and separate account shall be kept by the proper offices of each of such funds."

Article XIV § 3. The state university, the agriculture college, the school of mines and technology, the normal schools, a school for the deaf, a school for the blind, and

all other educational institutions that may be sustained either wholly or in part by the state shall be under the control of a board of five members appointed by the Governor and confirmed by the senate under such rules and restrictions as the Legislature shall provide.

Chapter 163, South Dakota Session Laws of 1895:

CHAPTER 163. APPROPRIATING LAND FOR THE SPRINGFIELD NORMAL SCHOOL.

AN ACT Appropriating Forty Thousand Acres of Land for the Maintenance of the State Normal School at Springfield, South Dakota.

WHEREAS, The legislative assembly of the Territory of Dakota, in the year 1881, passed an act establishing a territorial normal school at the town of Springfield in the county of Bon Homme, which act was in the year 1883 amended by requiring as a condition of such location that a deed conveying to the Territory of Dakota as a

location for the normal school buildings, twenty acres of land within the limits of said town of Springfield, should be executed to said Territory of Dakota within three months from the taking effect of said amendment; and

WHEREAS, Within the time prescribed by said act of 1883, a good and sufficient deed conveying to the Territory of Dakota, twenty acres of land in said town of Springfield, for the use of such normal school, was executed by John A. Burbank; and

WHEREAS, Still another deed was executed by said John A. Burbank, to the State of South Dakota, conveying the same tract of twenty acres of land hereinbefore mentioned, as evidence of the willingness of the said John A. Burbank to comply with the requirements of the said act of 1883; and

WHEREAS, The act of Congress known as the enabling act, for the admission of the State of South Dakota into the Union, ceded

to the State of South Dakota five hundred thousand acres of land for the maintenance of various educational institutions; and

WHEREAS, There are now one hundred and seventy thousand acres of said land unappropriated; therefore

Be it Enacted by the Legislature of the State of South Dakota:

§1. APPROPRIATION OF LAND. There is hereby appropriated for the support and maintenance of the state normal school at Springfield, South Dakota, forty thousand acres of land out of any lands donated to the State of South Dakota by the United States and not otherwise appropriated.

§2. GOVERNOR AND COMMISSIONER OF SCHOOL AND PUBLIC LANDS TO MAKE SELECTION. It is hereby made the duty of the governor, the commissioner of school and public lands and state auditor to make selections of the forty thousand acres of land mentioned in

the preceding Section within one year from the taking effect of this act, which lands, when so selected shall be set apart for the support and maintenance of the said normal school at Springfield, South Dakota.

§3. SALE OF LAND. The lands so selected as provided by this act, may be sold as now provided by law and the proceeds of such sales shall be invested as now provided by law for investment of the school funds of this state.

§4. PROCEEDS FOR SALE AND RENT OF LAND - - HOW APPLIED. All moneys received from the rent of the lands mentioned in this act, and all interest received from the investment of the proceeds of the sales of said lands shall be applied to the support and maintenance of said normal school at Springfield.

§5. REPEAL. All acts and parts of acts in conflict with the provisions of this act are hereby repealed.

Approved March 1, 1895.

Chapter 135, South Dakota Session Laws of 1971, the Board of Regents was authorized to merge the normal college at Springfield into and as a part of the University of South Dakota.

§4. Not withstanding any other provision of statute, the board of regents is empowered to enlarge the purpose, character and scope of the university of South Dakota to provide that of an outstanding technical and vocational college as well as provide a junior college program, at its Springfield campus.

Repealed, Chapter 128, Section 377, South Dakota Session Laws of 1975.

Chapter 138, South Dakota Session Laws of 1984, (S.B. 221)

MISSION OF THE UNIVERSITY OF SOUTH DAKOTA AT SPRINGFIELD CHANGED

AN ACT

ENTITLED, An Act relating to the university

of South Dakota at Springfield; changing its mission to a minimum security prison, providing for graduation, authorizing its sale or lease, providing an appropriation and declaring an emergency.

BE IT ENACTED BY THE LEGISLATURE OF THE STATE OF SOUTH DAKOTA:

Section 1. That § 13-57-23 be amended to read as follows:

13-57-23. The Springfield minimum security prison, formerly university of South Dakota at Springfield, located at Springfield in Bon Homme county, shall be under the control of the board of charities and corrections.

Section 2. That § 24-2-27 be amended to read as follows:

24-2-27. The board of charities and corrections may establish and maintain facilities outside the precincts of the penitentiary proper and contract with other governmental entities for the care and

maintenance of prisoners committed to the penitentiary or to the reformatory. However, no prisoner has any implied right or expectation to be housed in any particular facility and is subject to transfer from any one facility at the discretion of the warden of the penitentiary. An escape from a facility maintained outside the penitentiary is considered an escape from the penitentiary.

Section 3. That § 24-7-1 be amended to read as follows:

24-7-1. There is hereby created a department of organization of the state to be known as the South Dakota state prison industries, which shall constitute the operating organization for all the industries now established at the state penitentiary, including the twine and cordage plant, the license plate and stamping factory, the rug factory and the shoe factory. The same shall also embrace

all such new industries as may from time to time be established by the board of charities and corrections at the state penitentiary or other facilities for the employment of inmate labor.

Section 4. That title 24 be amended by adding thereto a new section to read as follows:

The board of regents and the board of vocational education shall take all necessary steps to assure that all students presently enrolled at the university of South Dakota at Springfield shall have the opportunity to complete their course of study in South Dakota at other public post-secondary vocational schools, public higher education institutions or a combination thereof, through articulation agreements. The board of regents shall include a baccalaureate program of vocational education within at least one of the institutions under its control.

Section 5. Notwithstanding any other provisions of statutory law, but, in compliance with the provisions of the Constitution of the state of South Dakota, the board of charities and corrections and the Governor are authorized to sell, grant and convey or lease the land, buildings and equipment, formerly called the university of South Dakota at Springfield, on such terms and conditions as they deem prudent to any person, partnership or corporation. The financial consideration passing to the state on any sale as provided above shall not exceed an assumption of the existing indebtedness, including any portion of the indebtedness of the South Dakota building authority, attributable to the facility formerly known as the university of South Dakota at Springfield and an adequate indemnification to the state and the South Dakota building authority against pecuniary loss. Any such lease agreed to shall

include an assumption of the annual payments to service the indebtedness described above and include an adequate indemnification to the state of South Dakota building authority against pecuniary loss. Such assumptions and indemnifications shall be backed by assets, letters of credit or other guarantees as reasonable and prudent business people demand in the conduct of their business affairs. Such power of sale or lease shall expire on the first day of May, 1984.

Section 6. In the event of the sale or lease provided for in section 5 of this Act, sections 1, 3 and 4 do not apply.

Section 7. The Governor, the board of regents and the board of charities and corrections shall transfer all funds necessary between the offices of the executive office of the board of charities and corrections, the office of the penitentiary, the office of the executive

director of the board of regents and the office of the university of South Dakota at Springfield to accomplish the purposes set forth in this Act.

Section 8. There is hereby appropriated out of any money in the state treasury, not otherwise appropriated, the sum of three million one hundred eight thousand six hundred fifty-four dollars ($3,108,654) for the operation of a minimum security prison. There is also hereby authorized eight hundred eighteen thousand nine dollars ($818,909) in federal fund expenditure authority and two million one hundred eighty-seven thousand six hundred ten dollars ($2,187,610) in other fund expenditure authority for the operation of a minimum security prison. There is authorized 111.3 general, 25.2 federal and 24.6 other fund full-time equivalent employee positions.

Section 9. In the event of the sale or

lease provided for in section 5, the board of charities and corrections shall expend the funds authorized by chapter 195 of the 1983 South Dakota session laws and presented to the sixtieth session of the legislative assembly, 1985, the following:

(1) Engineering/architectural estimates for planning and construction or renovation of a minimum security prison and vocational building and an operating budget for the minimum security prison and vocational education program and the existing penitentiary;

(2) A plan for a facility for the care and custody of the criminally insane and an operating budget for a facility for the care and custody of the criminally insane including cost of purchase and renovation;

(3) A plan for a facility for the care and custody of female prisoners and

an operating budget for a facility for the care and custody of female prisoners including cost of purchase or renovation.

Section 10. The students currently attending the university of South Dakota at Springfield are hereby authorized to complete the 1984 spring semester. The board of regents is hereby authorized to confer degrees upon those students qualifying for graduation.

Section 11. Whereas, this Act is necessary for the support of the state government and its existing public institutions, an emergency is hereby declared to exist, and this Act shall be in full force and effect from and after its passage and approval.

Signed March 9, 1984.

STATE OF SOUTH DAKOTA)
)SS
COUNTY OF HUGHES)

Civ. 84-444

IN CIRCUIT COURT

SIXTH JUDICIAL CIRCUIT

DOUGLAS J. KANALY, et al.,

Plaintiffs,

vs.

STATE OF SOUTH DAKOTA, et al.,

Defendants.

ORDER PERMITTING INTERVENTION

(Springfield No. 2)

On September 17, 1984, at the commencement of further hearing on Defendants' motion for summary judgment herein, Oscar W. Hagen, Robert R. Weber and Raymond Martinmaas, by their attorney, Charles Lacey, in accordance with their complaint in intervention heretofore filed herein, move the Court for permission to intervene in this action, all the Plaintiffs and Defendants above named being present by their attorneys; and it appearing to the Court that said

applicants claim an interest relating to the continued maintenance and operation of University of South Dakota at Springfield and its property, which is the subject matter of this action, and that they are so situated that the disposition of this action, as a practical matter, might impair or impede their ability to protect their interests as taxpayers; that they have no interest in any other action involving University of South Dakota at Springfield, except an action of their own previously instituted against the State of South Dakota, et al., now pending in this Court; now, therefor

IT IS ORDERED that Oscar W. Hagen, Robert R. Weber and Raymond Martinmaas be permitted to intervene in this action as Plaintiffs with the record as it now stands, upon condition, however, that said interveners dismiss their action of Oscar W. Hagen, et al., against the State of South

Dakota, et al., with prejudice and without costs.

Dated at Pierre, South Dakota, this 20th day of September, 1984.

BY THE COURT:

/s/Robert A. Miller
Robert A. Miller, Circuit Court Judge

ATTEST:

Mary L. Erickson, CLERK

By: Laura Hildebrandt, Deputy

(SEAL)

(Entered and filed in Circuit Court, Hughes County on September 20, 1984.)

STATE OF SOUTH DAKOTA)
)SS
COUNTY OF HUGHES)

CIV. 84-246

IN CIRCUIT COURT

SIXTH JUDICIAL CIRCUIT

OSCAR W. HAGEN, et al.,

Plaintiffs,

vs.

STATE OF SOUTH DAKOTA, et al.,

Defendants.

ORDER OF DISMISSAL

(Springfield No. 3)

The Plaintiffs, having applied for permission to intervene in the action of Douglas J. Kanaly, et al. vs. State of South Dakota, et al. (Springfield No. 2), and such permission having been granted by the Court upon condition that this action, Oscar W. Hagen, et al. vs. State of South Dakota, et al., be dismissed with prejudice, and the Plaintiffs, by their attorney, Charles Lacey, having consented to such dismissal and now move for the same, now therefor

IT IS HEREBY ORDERED that the above-entitled action (Springfield No. 3) be, and the same hereby is, dismissed, with prejudice.

Dated at Pierre, South Dakota, this 20th day of September, 1984.

BY THE COURT:

/s/ Robert A. Miller
Robert A. Miller, Circuit Court Judge

ATTEST:

Mary L. Erickson, CLERK

By: Laura Hildebrandt, Deputy

(SEAL)

(Entered and filed in the Circuit Court, Hughes County on September 20, 1984.)

MEMORANDUM DECISION of Circuit Court Judge Robert A. Miller, dated September 21, 1984:

STATE OF SOUTH DAKOTA)
COUNTY OF HUGHES)
IN CIRCUIT COURT
SIXTH JUDICIAL CIRCUIT

* * * * * * *

DOUGLAS J. KANALY, et al.,

Plaintiffs,

vs.

STATE OF SOUTH DAKOTA, et al.,

Defendants.

* * * * * * *

MEMORANDUM DECISION
RE: SUMMARY JUDGMENT

* * * * * * *

Pending before this Court are the issues raised in Defendants' Motion to Dismiss or Alternative Motion for Summary Judgment dated June 27, 1984. A hearing was held before this Court on September 17, 1984, at which time the Court heard argument of counsel.

Several of the issues were previously

discussed and/or ruled upon by this Court in my Memorandum Decision of July 10, 1984. Rather than fully re-stating and reiterating all of my prior holdings therein, that Memorandum Decision will be specifically incorporated herein by reference.

For the reasons previously stated in my July 10, 1984, Memorandum Decision, it is my opinion and I specifically find that no genuine issues of material fact exist, and hold:

1. That S.B. 221 is not violative of S.D. Constitution, Article III, §21, which prohibits a law from embracing more than one subject, which is to be expressed in its title;

2. That neither the emergency clause nor Section 11 of S.B. 221 violated S.D. Constitution, Article III, §1 or §22;

3. That Section 5 of S.B. 221 dealing with the appraisal and sale procedures is violative of S.D. Constitution, Article

VIII, §4 and §5; provided however, (1) that section may properly be severed from the act, leaving the constitutional balance thereof intact, and (2) this issue has been rendered moot by virtue of the failure of the State to sell the facility within the deadline provided in the act;

4. That S.B. 221 does not violate S.D. Constitution, Article XIV, §3, which places normal schools under the jurisdiction of the Board of Regents.

The following are issues not previously addressed by the Court and which are the subject of the current motion. As to the following issues, I find that there are no genuine issues of material fact and hold:

5. That Plaintiffs' claim that the combining of the offices of State Treasurer and Commissioner of School and Public Lands violates S.D. Constitution, Article VIII, §7 is now moot, since those offices are now severed;

6. That nothing in the Enabling Act, §17, created or mandated the existence or operation of any specific normal school, including USD/S or its predecessors;

7. That nothing in the S.D. Constitution specifically creates or mandates the existence or operation of any specific normal school, including USD/S or its predecessors;

8. That S.B. 221 and its effect of changing the character and purpose of the institution does not violate S.D. Constitution, Article VIII, §7 which created a perpetual trust from proceeds from grants and gifts;

9. That the deeds under which the State obtained title to the real estate upon which the institution is located, read as a whole, conveyed fee simple title to the State with no reversionary interests in the grantors;

10. That the provisions of S.B. 221 and its implementation do not create, as a matter of law, a default in the bonded indebtedness of the institution; that the provisions of SDCL Chapter 13-57A are not properly at issues in this litigation and that those Plaintiffs do not have standing to raise that issue, and, accordingly, those allegations should be dismissed;

11. That the Plaintiffs have not failed to join indispensable parties.

Some of the other allegations and issues in this litigation still contain genuine issues of material fact and therefore the Court will deny summary judgment thereon. The Court specifically finds that the following issues need yet to be litigated: whether S.B. 221 impaired any of Plaintiffs' contractual rights; whether there has been an unlawful taking of private property rights; and whether Plaintiffs' due process rights under the Fourteenth Amend-

ment to the U.S. Constitution have been violated.

This Court under the provision of SDCL 15-6-54(b) expressly determines that there is no just reason for delay, and further expressly determines that judgment should be entered consistent with this opinion. Counsel for Defendants is directed to submit a summary judgment consistent herewith, specifically incorporating therein this decision and my prior decision of July 10, 1984.

Dated at Pierre, South Dakota, this 21st day of September, 1984.

BY THE COURT:

/s/ROBERT A. MILLER
Robert A. Miller
Presiding Circuit Judge

ATTEST:

Clerk of Courts

(SEAL)

State of South Dakota
Circuit Court, Hughes Co.
FILED September 21, 1984

AMENDED COMPLAINT OF INTERVENERS (No. 2)

STATE OF SOUTH DAKOTA)
:SS
COUNTY OF HUGHES)

IN CIRCUIT COURT

SIXTH JUDICIAL CIRCUIT

DOUGLAS J. KANALY, et al.,

Plaintiffs

vs.

STATE OF SOUTH DAKOTA, et al.,

Defendants,

and

ETHEL HAGEN, Executrix of the Estate of Oscar William Hagen, ROBERT F. WEBER and RAYMOND MARTINMAAS,

Interveners.

The Interveners complain of the Defendants and allege:

I.

That each of the Interveners is a resident, citizen and elector and taxpayer

of the State of South Dakota, and that they bring this action on behalf of themselves and all persons similarly situated.

II.

That the University of South Dakota at Springfield, herein referred to as "USD Springfield," was established as Normal School for the Territory of Dakota by Chapter 101, Laws of Dakota 1881, providing that the "the exclusive purpose of which shall be the instruction of persons, both male and female, in the art of teaching and in all the various branches that pertain to a good common school education; also to give instruction in the mechanical arts, and in husbandry and agricultural chemistry, in the fundamental laws of the United States, and in what regards the rights and duties of citizens,' with a proviso 'That a tract of land, not less than eighty acres, adjacent to said town of Springfield be donated and secured to the Territory of Dakota, in fee

simple, as a site for said Normal School; that plaintiffs are informed and believe and therefore state that said proviso was amended about the year 1883 so as to require a tract of 20 acres, instead of 80 acres; and that various civic and religious groups, and interested citizens of and near Springfiled, Territory of Dakota, by public subscription and donation, obtained, secured and delivered deeds conveying the North One-Half of the Southwest One-Quarter of the Northeast One-Quarter of Section 23, Township 93, Range 60, for the site of said Normal School for the Territory of Dakota there, all in conformity with the conditions of said proviso.

III.

That by Section 17 of the Enabling Act of February 22, 1889, ch. 180, 25 Statutes at Large 676, the United States granted "To the state of South Dakota:. . .for state normal school, eighty thousand acres" and

provided "And the lands granted by this section shall be held, appropriated, and disposed of exclusively for the purpose herein mentioned, in such manner as the legislature of the respective states may severally provide"; That Section 11 of the Enabling Act provides:

> That all lands granted by this act shall be disposed of only at public sale after advertising . . .
>
> . . . provided, however, that none of such lands, nor any estate or interest therein, shall ever be disposed of except in pursuance of general laws providing for such disposition, nor unless the full market value of the estate or interest disposed of, to be ascertained in such manner as may be provided by law, has been paid or safely secured to the state.
>
> . . . the proceeds from the sale and other permanent disposition of any of the said lands and from every part thereof, shall constitute permanent funds for the support and maintenance of the public schools and the various state institutions for which the lands have been granted. Rentals on leased land, proceeds from the sale of timber and other crops, interest on deferred payments on land sold, interest on funds arising from these lands, and all other actual income, shall be available for the acquisition and construction of

> facilities, including the retirement of bonds authorized by law for such purposes, and for the maintenance and support of such schools and institutions . . .

IV.

That the State of South Dakota accepted said land grant, and during the past 95 years has paid and applied the portion of said Normal School, now University of South Dakota at Springfield, the proceeds and income from said land, in the acquisition of buildings in and equipment for, and the operation, support and maintenance of University of South Dakota at Springfield as a normal school and teachers' college; that as provided for by Article VIII, §§ 2 and 7 of the South Dakota Constitution, $830,669.77 has accumulated in the perpetual trust fund for the maintenance of the University of South Dakota at Springfield, and some 10,566,692 acres of its federal land grant remain unsold.

V.

That contrary to its dedicated purpose and the purposes and conditions stated in the Enabling Act, and in violation of Section 3, Article XIV, and Sections 7 and 8, Article VIII, of the South Dakota Constitution, the 1984 Legislature, without constitutional or statutory authority, enacted Chapter 138, Laws of 1984, purporting to change University of South Dakota at Springfield into a prison under the control of the State Board of Charities and Corrections; that the Governor and said Board have already assumed control of University of South Dakota at Springfield and have started to remove equipment therefrom and to sell it before making any appraisal and at a fixed price, amounting to abandonment, not constituting a public sale.

VI.

That the State of South Dakota, its educational interests, its people and its

taxpayers will suffer grievous and irreparable damage in the loss of University of South Dakota at Springfield and its long-established curriculum for public school teachers, advanced electronics and practical vocational training, and subjects relating to early civic culture and humanities in South Dakota not equally available in our educational system.

VII.

Chapter 138, Laws of 1984, violates Article III, §21 of the South Dakota Constitution in that it embraces more than one subject, i.e., a purported assumption of constitutional authority in the Legislature; a usurpation of the dedicated purpose of University of South Dakota at Springfield, and an alteration of the South Dakota prison system, together with an appropriation of some four million dollars to operate it.

VIII.

That Chapter 138, South Dakota Session

Laws of 1984, violates Article 1, § 10 of the United States Constitution, and Article VI, § 12 of the South Dakota Constitution in that it impairs the obligation of contract and is unconstitutional and void.

IX.

That Plaintiffs do not have a plain, speedy and adequate remedy at law.

X.

That Senate Bill 221 (Chapter 138, Session Laws of 1984) violates Section 23, subsection 2, of Article III, South Dakota Constitution, in that it changes the name of "University of South Dakota at Springfield" to "Springfield Minimum Security Prison."

XI.

That Chapter 138, Session Laws of 1984, violates Section 2, Article VI, South Dakota Constitution by and through the 14th Amendment in that it deprives the interveners and all of the citizens and taxpayers of the state of South Dakota of their liberty and

property by permitting the taking from them of an outstanding technical and vocational school and college without any provisions whatsoever for notice or hearing or consideration of values, extrinsic or intrinsic.

XII.

That, claiming authority under said Chapter 138 (Senate Bill 721), the defendant Governor, and the defendant Boards have arbitrarily seized and converted University of South Dakota at Springfield and all of the real and personal property of said institution without notice or hearing whatsoever.

WHEREFORE, the Plaintiffs pray that Chapter 138, South Dakota Laws of 1984, be adjudged unconstitutional and void; that the Defendants be permanently enjoined from interfering with the continued operation of University of South Dakota at Springfield; that the Plaintiffs have their costs of this

action and that they have such further relief as the Court may deem equitable, just and proper.

Dated at Sioux Falls, South Dakota, this 25th day of September, 1985.

/s/ Charles Lacey
Charles Lacey
1004 E. 35th Street
Sioux Falls, SD 57105

/s/ John Gridley
John N. Gridley, III
101 S. Main Avenue
Suite 402
Sioux Falls, SD 57102
Attorneys for Plaintiffs

MEMORANDUM OPINION of Circuit Court Judge Robert A. Miller, dated November 26, 1985:

CIRCUIT COURT OF SOUTH DAKOTA
SIXTH JUDICIAL CIRCUIT
Hughes County Courthouse
P.O. Box 1112
Pierre, South Dakota 57501
(605) 773-3711

Chambers of:
Robert A. Miller
Presiding Circuit Judge

November 26, 1985

Grant Gormley, Esq.
Chief Deputy Attorney General
State Capitol Building
Pierre, South Dakota 57501

Charles Lacey, Esq.
1004 East 35th Street
Sioux Falls, South DAkota 57105

Re: Kanaly et al. v. State et al.
Hughes County Civil
File 84-144

Dear Counsel:

Pending before this Court is Defendants' Motion to Dismiss or Alternatively to Strike, or for Partial Summary Judgment. The Motion was heard by this Court on November 26. I have considered the argument of counsel at the hearing and all of the

records and the argument of counsel at the hearing and all of the records and files herein, including the matters of which Mr. Lacey requested the court to take judicial notice. This letter will serve as a memorandum of my decision. I have thoroughly scrutinized Intervenors' Amended Complaint dated September 20, 1985, comparing the allegations and prayers therein to the Supreme Court's holding in this action, as the same is reported at 368 N.W.2d 819 (S.D. 1985).

The Amended Complaint prays:

> . . . that Chapter 138, South Dakota Laws of 1984, be adjudged unconstitutional and void; that Defendants be permanently enjoined from interfering with the continued operation of University of South Dakota at Springfield; that the Plaintiffs have the costs of this action and that they have such further relief as the Court may deem equitable, just and proper.

Each and everything requested by Intervenors in their Amended Complaint has already been addressed and disposed of by the Supreme Court. The Court held that the act was not unconstitutional and that Defendants could not be permanently enjoined from closing the college at USD/S.

Additionally, the specific allegations contained in paragraphs V, VI, VII and X have been specifically addressed and decided adversely to Intervenors by the Supreme Court.

Further, the issues and allegations dealing with breach of employment contract rights, unlawful taking of private property and due process considerations were dismissed by Plaintiffs and Intervenors in order to effectuate the appeal. Therefore,

those issues were not before the Supreme Court on appeal. Nonetheless, Intervenors are bound by their prior dismissal of those allegations. Even were Intervenors not so bound, I am of the opinion that Defendants would be entitled to summary judgment thereon since there is no genuine issue of material fact and the law is clear that Intervenors are not entitled to any recovery thereunder.

For all of the foregoing reasons, Defendants' Motion to Dismiss will in all things be granted. Mr. Gormley is directed to prepare an order consistent with this letter decision.

Very truly yours,

Robert A. Miller
Presiding Circuit Judge

Original filed with Clerk of Courts

FINDINGS OF FACT, CONCLUSIONS OF LAW, AND ORDER, dated December 10, 1985, entered by Circuit Court Judge Robert A. Miller. Civ. No. 84-144:

* * *

DOUGLAS J. KANALY, et al.,

Plaintiffs,

v.

STATE OF SOUTH DAKOTA, et al.,

Defendants,

and

ETHEL HAGEN, Executrix of the Estate of Oscar William Hagen, ROBERT F. WEBER and RAYMOND MARTINMAAS,

Intervenors.

* * *

FINDINGS OF FACT,
CONCLUSIONS OF LAW,
AND ORDER

* * *

The above-entitled matter having come on for hearing in the Hughes County Courthouse, Pierre, South Dakota, on the twenty-sixth day of November, 1985, before

the Honorable Robert A. Miller, presiding; the Plaintiffs appearing in person, assisted by counsel, Mr. Charles Lacey, the Defendants appearing by Chief Deputy Attorney General, Grant Gorley; the Court having heard and examined the pleadings of the parties, having received all files and records herein, and having issued a memorandum decision dated November 26, 1985, propounds the following:

FINDINGS OF FACT

I.

Intervenor's Amended Complaint prays:

> . . . that Chapter 138, South Dakota Laws of 1984, be adjudged unconstitutional and void; that Defendants be permanently enjoined from interfering with the continued operation of University of South Dakota at Springfield; that the Plaintiffs have the costs of this action and that they have such further relief as the Court may deem equitable, just and proper.

II.

In response, Defendants made a Motion to Dismiss or Alternatively to Strike, or for Partial Summary Judgment.

III.

The issues and allegations dealing with breach of employment contract rights, unlawful taking of private property, and due process considerations were dismissed by Plaintiffs and Intervenors in order to effectuate the appeal in Kanaly v. State, 368 N.W.2d 819 (S.D. 1985)

CONCLUSIONS OF LAW

I.

This Court has jurisdiction to review the matter under SDCL § 16-6-9.

II.

Each and everything requested by the Intervenors in their Amended Complaint has already been addressed and disposed of by the South Dakota Supreme Court in Kanaly v. State, 368 N.W.2d 819 (S.D. 1985).

III

The specific allegations contained in paragraphs V, VI, VII, and X of Intervenor's Amended Complaint have been specifically

addressed and decided adversely to Intervenors by the Court in Kanaly v. State, 368 N.W.2d 819 (S.D. 1985).

IV.

Intervenors are bound by their prior dismissal (in Kanaly v. State, 368 N.W.2d 819 (S.D. 1985)) of the issues and allegations dealing with breach of employment contract rights, unlawful taking of private property, and due process.

V.

In the alternative, if Intervenors are not bound by their prior dismissal of the issues and allegations dealing with breach of employment contract rights, unlawful taking of private property, and due process, Intervenors are not entitled to any recovery as a matter of law.

VI.

On November 26, 1985, this Court issued a Memorandum Opinion in the instant action, a copy of which is attached hereto, the

legal conclusions of which are fully incorporated herein by reference.

Accordingly, upon the foregoing Findings of Fact and Conclusions of Law,

IT IS HEREBY ORDERED, ADJUDGED AND DECREED, that the Complaint, filed herein be dismissed, on the merits, in its entirety, from this date forward.

Dated at Pierre, South Dakota, on this 10th day of December, 1985.

BY THE COURT:

/s/ROBERT A. MILLER
Robert A. Miller
Circuit Court Judge

ATTEST:

_____
Clerk of Court

STATE OF SOUTH DAKOTA)
:SS
COUNTY OF HUGHES)

Civ. 84-144
Hughes County

IN CIRCUIT COURT

SIXTH JUDICIAL CIRCUIT

DOUGLAS J. KANALY, et al.,

Plaintiffs,

v.

STATE OF SOUTH DAKOTA, et al.,

Defendants,

and

ETHEL HAGEN, Executrix of the Estate of Oscar William Hagen, ROBERT F. WEBER, and RAYMOND MARTINMAAS,

Intervenors.

* * * *

OBJECTIONS TO FINDINGS FACT AND CONCLUSIONS OF LAW

* * * *

* * * OBJECTIONS TO FINDINGS OF FACT * * *

I.

Finding of Fact I is inapplicable. Defendants not having defaulted, the Complaint is sufficient if facts alleged state any

proper claim for relief.

II.

Finding of Fact II is surplusage.

III.

Finding of Fact III triggers Summary Judgment procedure. The Court failed to give Intervenors reasonable opportunity to present all material made pertinent to Defendants' Motion by SDCL 15-6-56.

* * * OBJECTIONS TO CONCLUSIONS OF LAW * * *

I.

No objection.

II.

Intervenors were not parties in the Kanaly appeal nor were they given notice of the application to finalize the Order appealed.

III.

Same objection as to No. II.

IV.

In the absence of evidence justifying the "with prejudice" requirement, the Court

was in error and without jurisdiction to impose it. The Court imposed the requirement only to prevent Intervenors from having recourse to the Springfield 3 action in the event they were disappointed in this Court. The dismissals, and the Stipulation, referred to the "action", and not to a "claim upon which relief can be granted." A genuine issue of fact is present.

V.

Same objection as to Finding of Fact II and III. The issues referred to Conclusion of Law of Law V are expressly excepted from the partial Summary Judgment dated September 25, 1984, appealed from as follows:

> IT IS FURTHER ORDERED, ADJUDGED AND DECREED THAT GENUINE ISSUES OF MATERIAL FACT presently exist regarding plaintiff's claim of breach of contractual rights, of plaintiff's claims of unlawful taking of private property rights, and plaintiff's claims of violation of due process rights under the Fourteenth Amendment to the U.S. Constitution, and that summary judgment is denied regarding those issues.

Dated at Sioux Falls, South Dakota,

this 11th day of December, 1985.

CHARLES LACEY, One of the
Attorneys for the Intervenors

STATE OF SOUTH DAKOTA)
SS
COUNTY OF HUGHES)

IN CIRCUIT COURT

SIXTH JUDICIAL CIRCUIT CIV. 84-144

DOUGLAS J. KANALY, et al.,

Plaintiffs,

v.

STATE OF SOUTH DAKOTA, et al.,

Defendants,

and

ETHEL HAGEN, Executrix of the Estate of Oscar William Hagen,

Intervenor and Appellant,

and

ROBERT R. WEBER and RAYMOND MARTINMAAS,

Intervenors.

* * *

NOTICE OF APPEAL

* * *

TO: STEVEN M. JOHNSON and CELIA MINER, Attorneys for the Plaintiff; DENNIS R. HOLMES, GRANT GORMLEY and THOMAS HARMON, Assistant Attorneys General, and ROBERT D.

HOFER, Attorneys for the Defendants and the STATE OF SOUTH DAKOTA; JOHN BASTIAN, Assistant Attorney General, Attorney for the SOUTH DAKOTA BOARD OF CHARITIES AND CORRECTIONS: GARY COLWILL and MARK BARNETT, and JAMES CARLON and DAVID BRAUN, Attorneys for the SOUTH DAKOTA BOARD OF REGENTS: and DAVID L. BERGREN, Attorney for WILLIAM JANKLOW, Governor; and ROBERT R. WEBER and RAY MARTINMAAS, Co-intervenors not appealing:

PLEASE TAKE NOTICE that intervenor Ethel Hagen appeals to the Supreme Court of South Dakota from the final judgment, designated "Findings of Fact, Conclusions of Law, and Order," rendered in this action on the 9th day of December, 1985.

Dated this 13th day of January, 1986.

CHARLES LACEY and
JOHN N. GRIDLEY III

By /s/ Charles Lacey
Attorney for Ethel Hagen,
Intervenor and Appellant
1004 East 35th Street
Sioux Falls, SD 57105

(Entered and filed in the Circuit Court, Hughes County on January 14, 1986.)

Appeal No. 15249

March 25, 1987

IN THE SUPREME COURT)
SS.
State of South Dakota)

Present: Chief Justice George W. Wuest and Justices Robert E. Morgan, Frank E. Henderson, Richard W. Sabers and Circuit Judge Robert C. Heege, sitting for Justice Robert A. Miller, disqualified.

DOUGLAS J. KANALY, et al.,

Plaintiffs,

vs.

STATE OF SOUTH DAKOTA, et al.,

Defendants and Appellees.

and

ETHEL HAGEN, Executrix of the Estate of Oscar William Hagen,

Intervenor and Appellant,

and

ROBERT R. WEBER and RAYMOND MARTINMAAS,

Intervenors.

This Cause coming on to be heard upon the merits of the cause, oral argument having been dispensed with by the Court, and

the Court having advised thereon and filed its decision in writing, now, therefore,

IT IS CONSIDERED, ORDERED AND ADJUDGED that the Order of the Circuit Court, within and for Hughes County, appealed from herein, be and the same is hereby affirmed.

AND IT IS FURTHER ORDERED that this cause be and it is hereby remanded to said Circuit Court for further proceedings according to law and the decision of this Court.

AND IT IS FURTHER ORDERED AND ADJUDGED that no costs be taxed.

BY THE COURT:

/s/ George W. Wuest

Chief Justice

ATTEST:

/s/Gloria J. Engel
Clerk of the Supreme Court

(Seal)

(Entered and filed March 25, 1987, Supreme Court State of South Dakota, Gloria J. Engel, Clerk)

IN THE SUPREME COURT OF THE STATE OF SOUTH DAKOTA

Case No. 15429

DOUGLAS J. KANALY, et al.,

Plaintiffs,

v.

STATE OF SOUTH DAKOTA, et al.,

Defendants and Appellees,

and

ETHEL HAGEN, Executrix of the Estate of Oscar William Hagen,

Intervenor and Appellant,

and

ROBERT R. WEBER and RAYMOND MARTINMAAS,

Intervenors.

* * * * *

PETITION FOR REHEARING

* * * * *

Comes now the attorney of record for ETHEL HAGEN, the Intervenor and Appellant in the above-entitled action, and petitions the Court for a rehearing of her cause on the following points, to-wit:

I.

The Trial Court acted without jurisdiction in requiring Hagen, et al. to dismiss their pending action with prejudice in Case No. Civ. 84-246 as a condition for intevening in Kanaly, or in the alternate, it abused its discretion in so ruling. Tr. Vol. 2 of 2, pp. 11-15 (467-468, 705-707).

II.

The Trial COurt acted without jurisdiction in dismissing the Amended Complaint of Intervenor (411-416) on the basis of the Stipulation and Order of Dismissal (495-496) for the reason that they purport to alter, change, and rewrite the Trial Court's Order of Dismissal (468) already made and entered (707) on September 20, 1984.

Boshart v. National Ben. Assn., Inc. of Mitchell, 65 S.D. 260, 273 N.W. 7 (1937).

III.

The Intervenors are not parties to the Kanaly appeal (Kanaly v. State by and

through Janklow, 368 N.W.2d 819 (S.D. 1985)) and are not bound by it for the reason that the Notice of Appeal was not served upon them as required by SDCL 15-26A-4 (2) (1984), nor was the Notice of Appeal filed before the expiration of the time to appeal. The whole Appeal is void.

SDCL 15-26A-4 (2) (3); (506-507, 707).

Grand Island and W.C.R. Co. vs. Sweeney, (C.C.A., Eighth Circuit), 103 Fed. 342, 43 C.C.A. 255, Appeal dismissed, 181 U.S. 616, 45 L.Ed. 1029, 21 S. Ct. 924.

IV.

In Kanaly (S.D. 1985), 368 N.W.2d at page 822, the Court says:

> The trial court next entertained appellees' motion for summary judgment and held on September 21, 1984, that no genuine issue of material fact existed as to the constitutionality of S.B. 221 but that certain issues, later dismissed by plaintiffs, and thus not before this Court, were a)breach of employment contract rights, b)the unlawful taking of private property, and c)due process considerations. It is from this partial summary judgment that appellants now appeal.

The statement is incorrect to the point of actual falsehood. The dismissal, in point I, supra, above, submitted by the Intervenors and entered on September 20, 1984, was in the exact language of the Trial Court's oral ruling made three (3) days earlier. The purported dismissal (495) referred to in point II, supra, above, was not entered until four (4) days later and was illegal and void. Nevertheless, the Stipulation (495) contained the following paragraph:

> IT IS HEREBY STIPULATED that the above-named Plaintiffs and their respective attorneys-of-record, shall be allowed to intervene in the lawsuit entitled Kanaly, et al. v. State of South Dakota, et al., better known as Springfield II.

and the proprosed Order (496) likewise provided:

> IT IS HEREBY STIPULATED that the above-named Plaintiffs, and their respective attorneys-of-record, shall be allowed to intervene in the lawsuit entitled Kanaly, et al. v. State of South Dakota, et al., better known as Springfield II.

Boshart v. National Ben. Assn., Inc. of Mitchell, 65 S.D. 260, 273 N.W. 7 (1937).

THE INTERVENORS RENEW THEIR REQUEST FOR ORAL ARGUMENT.

Dated at Sioux Falls, South Dakota, this 13th day of April, 1987.

/s/ Charles Lacey
CHARLES LACEY, One of the
Attorneys for the Intervenor
1004 East 35th Street
Sioux Falls, SD 57105

IN THE SUPREME COURT)
)SS
STATE OF SOUTH DAKOTA)

I, Gloria J. Engel, Clerk of the Supreme Court, within and for the State of South Dakota, do hereby certify that the above and foregoing is a full, true, correct and complete transcript and copy of the JUDGMENT of the Supreme Court of the State of South Dakota, in the above-entitled cause, to wit:

DOUGLAS J. KANALY, PATRICK S. KONECHNE, DENNIS LIHS, ROBERT McBRIDE, DONALD VAN CLEAVE and JOSEPH W. WOLF, Plaintiffs, vs. STATE OF SOUTH DAKOTA, by and through its Governor, WILLIAM J. JANKLOW, and its Attorney General, MARK MEIERHENRY, THE SOUTH DAKOTA BOARD OF REGENTS, THE BOARD OF CHARITIES AND CORRECTIONS and JOHN J. GERKEN, Commissioner of School and Public Lands, Defendants and Appellees, and ETHEL HAGEN, Executrix of the Estate of Oscar William Hagen, Intervenor and Appellant, and

ROBERT R. WEBER and RAYMOND MARTINMAAS, Intervenors.

IN WITNESS WHEREOF, I have hereunto set my hand and affixed the seal of said Court, this 30th day of April, 1987.

/s/Gloria J. Engel
Clerk of the Supreme Court

By: Dorothy A. Smith
Deputy

Costs taxed and allowed as follows:

For Argument $

Trial Clerk's Fee to Certify Record $

Printing Brief $

Supreme Court Filing Fee $

Transcript $

TOTAL $

(Seal)

(Entered and filed Circuit Court, Hughes County May 6, 1987)

STATE OF SOUTH DAKOTA)
ss
COUNTY OF HUGHES)

IN CIRCUIT COURT

SIXTH JUDICIAL CIRCUIT

Civ. 84-144
Hughes County

DOUGLAS J. KANALY, et al.

Appellees,

vs.

STATE OF SOUTH DAKOTA, et al.

Appellees,

and

ETHEL HAGEN, Executrix of the
Estate of Oscar William Hagen,

Intervenor and Appellant,

and

ROBERT R. WEBER and
RAYMOND MARTINMAAS,

Intervenors.

NOTICE OF APPEAL
to the
SUPREME COURT of the
UNITED STATES

Notice is hereby given that Ethel Hagen, the intervenor and appellant above-named, hereby appeals to the Supreme Court of the United States from the final judgment

of the Supreme Court of South Dakota, entered in this action in the circuit court above-named on May 6, 1987, affirming the judgment of said circuit court in this action dismissing the Amended Complaint of Intervenors, Number 2, on its merits.

This appeal is taken pursuant to 28 USC §

II. The Clerk will please prepare a transcript of the record, in this cause, for transmission to the Clerk of the Supreme Court of the United States, and include in said transcript the following:

1. The amended complaint in the action of the intervenors, Hagen et al. v. State, et al (Civ. 84-216) and Sheriff's Returns of Serving same.

2. The Amended Complaint of Intervenors (Civ. 84-144) and Certificate of Service (Index p. 506).

3. Transcripts of three heardings held on 9-17-84, 9-17-85 and 11-26-86, respectively (Civ. 84-144).

4. Proceedings on October 22, 1984,

pre-trial hearing (Civ. 84-144).

5. All proceedings relating to the purported order dismissing without prejudice certain allegations in the the intervenors Amended Complaint, including plaintiffs' motion and the certificate of service. (Index 508-509).

6. All of Interveners' Exhibits 1 and 2 (Index pp. 613-616) and 3 to 60 and 13 and 16 under separate cover.

7. The Notice of Appeal in this case of Kanaly et al. v. State (S.D., 1985) (South Dakota Supreme Court File #14716).

III. The following questions are presented by this appeal:

1. The Intervenors were denied a trial?

2. Does Chapter 138, South Dakota Session Laws of 1984, changing University of South Dakota at Springfield, South Dakota, a United States Land grant normal school long of college status into a prison violate the South Dakota Enabling Act?

3. Do the South Dakota Enabling Act; Chapter 101, Laws of Dakota 1881; Chapter 195, S.D. Session Laws of 1895; Chapter 135, S.D. Session Laws of 1871; and the allegations of Intervenors' complaint admitted by the motion to dismiss, in the absence of any conflicting evidence, establish perpetual dedication?

4. Is the appeal in Kanaly et al. v. State et al. void because two parties were not served with the Notice of Appeal as required by South Dakota Law?

5. Are the intervenors bound by the decision in the Kanaly case when they were not parties therein?

6. Is the order dismissing part of interveners' complaint "without prejudice and without their knowledge void?

/s/ CHARLES LACEY
CHARLES LACEY, Attorney
for Ethel Hagen,
Appellant
1004 East 35th Street
Sioux Falls, SD 57105

#15249

No.

IN THE SUPREME COURT

OF THE

STATE OF SOUTH DAKOTA

Civ. 84-144
Hughes County

DOUGLAS J. KANALY, et al.,

Plaintiffs and Appellees,

vs.

STATE OF SOUTH DAKOTA, et al.,

Defendants and Appellees,

and

ETHEL HAGEN, Executrix of the
Estate of Oscar William Hagen,

Intervenor and Appellant,

and

ROBERT H. WEBER and
RAYMOND MARTINMAAS,

Intervenors.

NOTICE OF APPEAL
to the
SUPREME COURT OF THE
UNITED STATES

(2nd Appeal)

Notice is hereby given that Ethel Hagen, the intervenor and appellant above named, appeals to the Supreme Court of the United States from the final judgment of the Supreme Court of South Dakota, entered in this action in the circuit court in and for Hughes County on May 6, 1987, affirming the judgment of said circuit court dismissing the Amended Complaint of Intervenors, No. 2, on its merits.

This appeal is taken pursuant to 28 USC § 1257 (2).

II.

The Clerk will please prepare a transcript of the record in this action, for transmission to the Clerk of the Supreme Court of the United States, and include in said record the following:

1. The Amended Complaint in the action of the intervenors Hagen et al. v. State, et al. (Civ. 84-216), et al., and the Sheriff's Return of serving the same.

2. The Amended Complaint of intervenors in this action (84-144) and the Certificate of Service. Clerk's Index p. 506.

3. Transcripts Vol. 1 of 1, 1 of 1, and 2 of 2.

4. Proceedings at Pre-Trial hearing or, if none, any notation to that effect.

5. All proceedings relating to the purported order dismissing certain allegations in the intervenors' Amended Complaint, including plaintiffs' motion and the Certificate of Service. (Index 508-509).

6. All of Intervenors' Exhibits 1 and 2 (Index 613-616) and 3 to 10, 13 16 under separate cover.

7. The Notice of Appeal and Certificate of Service of the same in the case of Kanaly et al., v State (S.D., 1985), 368 N.W.2d 819.

III

The following questions are presented by this second appeal, to wit:

1. Is Chapter 138, South Dakota Session Laws of 1984, (S.B. 221), unconstitutional and void because it attempts to change University of South Dakota at Springfield, a federal land grant normal school, into a

prison, repugnant to the provisions of the Enabling Act, Act of February 22, 1889, Ch. 180, 25 Statutes at Large 676, and its duly constituted purpose?

2. Is the whole appeal proceding in Kanaly et al. v. State et al., (S D 1985), 368 N.W.2d 819, void because the Notice of Appeal therein was not served upon all of the parties therein, to-wit: None of the intervenors was named or served therein?

3. Is the appeal in Kanaly res adjudicata against any of the intervenors?

4. The Supreme Court of South Dakota was misled by the statements referred to in the following language quoted from its opinion in 368 N.W.2d at page 822, to-wit:

> The trial court next entertained appellees' motion for summary judgment and held on September 21, 1984, that no genuine issue of material fact existed as to the constitutionality of S.B. 221 but that certain issues, later dismissed by plaintiffs, should be tried. Those issues dismissed, and thus not before this Court, were a)breach of employment contract rights, b)the unlawful taking of private property, and c)due process considerations. It is from this

partial summary judgment that appellants now appeal.

for the reason that those statements made to the Court were an absolute deliberate falsehood, made in support of a motion not served on the intervenors and to which they were not made a party and had no knowledge of, and to which the garbled language referring both to dismissal and a subsequent trial at which the false issues could be tried betrays intentional dissemblement.-

/s/ Charles Lacey
Charles Lacey
Attorney at Law
1004 East 35th Street
Sioux Falls, SD 57105
Attorney for the
Intervenor and
Appellant, Ethel
Hagen.

7-27-87

KANALY v. STATE BY AND THROUGH JANKLOW, 40
N.W.2d 33 (S.D. 1987)

DOUGLAS J. KANALY, et al.,

Plaintiffs and Appellees,

v.

STATE OF SOUTH DAKOTA, et al.,

Defendants and Appellees,

and

ETHEL HAGEN, Executrix of the
Estate of Oscar William Hagen,

Intervenor and Appellant,

and

ROBERT R. WEBER and
RAYMOND MARTINMAAS,

Intervenors.

No. 15249

Supreme Court of South Dakota.

Considered on Briefs Jan. 15, 1987.

Decided March 25, 1987.

Rehearing Denied April 30, 1987.

See also, S.D., 401 N.W.2d 551.

John W. Bastian, Asst. Atty. Gen., Pierre,

Grant Gormley, Chief Deputy Atty. Gen.,

Pierre, for defendants and appellees; Mark V. Meierhenry, Atty. Gen., Pierre, on the brief.

Charles Lacey, Sioux Falls, for intervenor and appellant.

PER CURIAM.

This is an appeal from an order dismissing intervenor Ethel Hagen's second amended complaint. We affirm.

The complaint in intervention, as amended, seeks to revisit the constitutionality and propriety of Chapter 138 of the 1984 South Dakota Session Laws (S.B. 221). Senate Bill 221 converted the campus of the University of South Dakota, Springfield, from an educational institution into a minimum security prison and transferred control of the Springfield prison to the Board of Charities and Corrections.

In Kanaly v. State, 368 N.W.2d 819 (S.D. 1985) (Kanaly I), this court dealt with the constitutionality of S.B. 221. In

Supreme Court, U.S.
FILED
DEC 3 1987
JOSEPH F. SPANIOL, JR.
CLERK

No. 87-720

IN THE
SUPREME COURT OF THE UNITED STATES

October Term, 1987

ETHEL HAGEN,

Intervenor and Appellant,

vs.

DOUGLAS J. KANALY, et al.,

Plaintiffs and Appellees,

vs.

STATE OF SOUTH DAKOTA, etc., et al.

Defendants and Appellees,

ON APPEAL FROM THE
SUPREME COURT OF SOUTH DAKOTA

MOTION OF DEFENDANTS AND APPELLEES STATE OF SOUTH DAKOTA, etc., et al., TO DISMISS

JOHN W. BASTIAN
Assistant Attorney General
State Capitol
Pierre, S.D. 57501-5090
Attorney for Defendants
and Appellees

December 2, 1987

QUESTION PRESENTED

The question presented by this motion to dismiss is whether Appellant's failure to docket the appeal within the specified time warrants its dismissal and whether the federal question sought to be raised by Appellant was expressly passed on by the South Dakota Supreme Court, where

(a) Appellant's Jurisdictional Statement was filed forty-two days after the appeal deadline followed by an Amended Jurisdictional Statement filed ninety-six days after the appeal deadline and no extension was requested or granted pursuant to Rule 12.2 of the Supreme Court of the United States, and

(b) The issue presented by Appellant was not expressly passed on by the South Dakota Supreme Court in the case from which Appellant appeals.

PARTIES TO PROCEEDINGS BELOW

Original parties before the South Dakota Supreme Court: (1) State of South Dakota, the South Dakota Board of Regents, the South Dakota Board of Charities and Corrections and John J. Gerkin, Commissioner of School and Public Lands as Defendants and Appellees herein; (2) Douglas J. Kanaly, Patrick S. Konechne, Dennis Lihs, Robert McBride, Donald Van Cleave and Joseph W. Wolf, as Plaintiffs and Appellees herein; (3) Robert R. Weber and Raymond Martinmaas, as Intervenors; (4) Ethel Hagen, the Intervenor and Appellant herein.

This motion to dismiss is brought solely by Defendants and Appellees above-named.

TABLE OF CONTENTS

	Page
Question Presented	i
Parties to proceedings below	ii
Table of Authorities	iv
Statutory provision involved	2
Statement	3
Argument	
1. The appeal should be dismissed because it was not taken in conformity with the Rules of the Supreme Court of the United States.	7
2. The appeal should be dismissed because the federal question sought to be reviewed has not been properly raised and was not expressly passed on by the South Dakota Supreme Court.	9
Conclusion	11

TABLE OF AUTHORITIES

Cases:

Kanaly v. State by and through Janklow, 403 N.W.2d 33 (S.D. 1987)(Designated herein as Kanaly II)	PASSIM
Kanaly v. State by and through Janklow, 368 N.W.2d 819 (S.D. 1985)(Designated herein as Kanaly I)	3,6,7,10
Pittsburgh Towing Co. v. Mississippi Valley Barge Line Co., 385 U.S. 32 (1966)	8, 9
Shapiro v. Doe, 396 U.S. 488 (1970)	9
CONSTITUTION, STATUTE AND RULE:	
28 U.S.C. § 1257(2)	2, 9, 11
28 U.S.C. § 2101(c)	4
1984 S.D.Sess.Laws ch. 138 (S.B. 221/1984)	3, 6
MISCELLANEOUS:	
Chapter 180, 25 Statute at Large 676 (North Dakota-South Dakota Enabling Act)	PASSIM

No. 87-720

IN THE
SUPREME COURT OF THE UNITED STATES

October Term, 1987

ETHEL HAGEN,

Intervenor and Appellant,

vs.

DOUGLAS J. KANALY, et al.,

Plaintiffs and Appellees,

vs.

STATE OF SOUTH DAKOTA, etc., et al.

Defendants and Appellees,

ON APPEAL FROM THE
SUPREME COURT OF SOUTH DAKOTA

MOTION OF DEFENDANTS AND APPELLEES
STATE OF SOUTH DAKOTA, etc., et al.,
TO DISMISS

Pursuant to Rule 16.1, the Defendants and Appellees State of South Dakota, etc., et al., move to dismiss the appeal filed on behalf of Ethel Hagen,

the Intervenor and Appellant herein. The motion is grounded on the fact that the appeal was not taken in conformity with the Rules of the Supreme Court of the United States, nor does the appeal present a federal question that was expressly passed on by the court below.

STATUTORY PROVISION INVOLVED

In pertinent part, 28 U.S.C. § 1257 provides that "[f]inal judgments or decrees rendered by the highest court of a state in which a decision could be had, may be reviewed by the Supreme Court. . . [b]y appeal, where is drawn in question the validity of a statute of any state on the ground of its being repugnant to the Constitution, treaties or laws of the United States, and the decision is in favor of its validity." 28 U.S.C. 1257(2).

STATEMENT

The jurisdictional problem posed by the appeal to this Court is found in the culmination of the following procedural developments:

1. On May 29, 1985, the South Dakota Supreme Court handed down Kanaly v. State by and through Janklow, 368 N.W.2d 819 (S.D. 1985)(hereinafter Kanaly I) in which the court considered various attacks on Senate Bill 221/1984, now found in 1984 S.D.Sess.Laws ch. 138 which closed the University of South Dakota-Springfield (USD/S) and transferred control of the facilities to the South Dakota Board of Charities and Corrections without consideration. Intervenors, including Appellant herein, filed an amicus curiae brief on their own behalf challenging the statute.

2. The case from which Appellant appeals, Kanaly v. State by and through Janklow, 403 N.W.2d 33 (S.D. 1987)(hereinafter Kanaly II) was decided by the South Dakota Supreme Court on March 25, 1987. Petition for rehearing was denied April 30, 1987. Notice of appeal was filed by Appellant in the South Dakota Supreme Court on July 27, 1987, within the time set forth by statute. 28 U.S.C. 2101(c).

3. On September 9, 1987, Appellant entered an appearance, submitted the docket fee, and filed a jurisdictional statement. An amended jurisdictional statement was filed on or about November 2, 1987.

4. In both the original and amended jurisdictional statements,

Appellant presents only the following question for resolution by this Court:

> Is chapter 138, South Dakota Session Laws of 1984 (S.B. 221) unconstitutional in that it is repugnant to the provisions of the North Dakota-South Dakota Enabling Act and would change the University of South Dakota at Springfield, a federal land grant college, into a prison?

See Jurisdictional Statement, p. 1 (not paginated); Amended Jurisdictional Statement, p. i.

5. Appellant claims that in Kanaly II, supra, the South Dakota Supreme Court held that chapter 138 of the 1984 South Dakota Session Laws (Senate Bill 221/1984) did not violate and was not repugnant to the provisions of the North Dakota-South Dakota Enabling Act. See Jurisdictional Statement, p. 2; Amended Jurisdictional Statement, pp. 3-4. However, the South Dakota

Supreme Court made no such ruling in Kanaly II, supra, but did address the question in Kanaly I, supra.

6. In Kanaly I, supra, the South Dakota Supreme Court found that certain provisions of the Enabling Act and the State Constitution create a special, permanent and perpetual trust of all land, money, property, and proceeds of the same, donated to the state for educational institutions by the United States and individuals alike and that S.B. 221/1984 (1984 S.D.Sess.Laws ch. 138) which facilitated the state is the trustee. Kanaly I, 368 N.W.2d at 822-3. The South Dakota Supreme Court determined that the transfer of the former University of South Dakota/Springfield from the Board of Regents to the Board of Charities and

Corrections was contrary to the State Constitution and violative of the Enabling Act. Kanaly I, 368 N.W.2d at 824. The court specifically held that the permanent trust fund provisions of the Enabling Act were breached by the statute and remanded the case to the trial court to conduct hearings concerning the extent and nature of all property and interest transferred to the Board of Charities and Corrections from the Board of Regents and its full market value. Kanaly I, 368 N.W.2d at 824, 829. The South Dakota Supreme Court made no such ruling or any other regarding the Enabling Act in Kanaly II, supra, from which Appellant now appeals.

ARGUMENT

1. THE APPEAL SHOULD BE DISMISSED BECAUSE IT WAS NOT TAKEN IN CONFORMITY

WITH THE RULES OF THE SUPREME COURT OF THE UNITED STATES.

The Rules of this Court provide that not more than ninety days after the entry of the judgment appealed from or the denial of a petition for rehearing, the Appellant must docket the case by filing, inter alia, the jurisdictional statement. See Rules 10.1, 11.3, 12.1, 12.3. Appellant's Jurisdictional Statement and Amended Jurisdictional Statement were filed forty-two days and approximately ninety-six days, respectively, beyond the appeal deadline. No request for an extension of time was made by Appellant pursuant to Rule 12.2.

In Pittsburgh Towing Co. v. Mississippi Valley Barge Line Co., 385 U.S. 32 (1966), this Court declared:

> This court has been generous in excusing errors of counsel, but

> if there are to be rules, there must be some limit to our willingness to overlook their violation. While we are inclined to be generous in exercising our discretion to forgive a mistake and waive the consequences of negligence, fairness to other counsel and to parties with business before the court as well as due regard for our own procedures lead us to believe that this case does not warrant our indulgence.

Pittsburgh Towing, supra, at 32-33. See also Shapiro v. Doe, 396 U.S. 488 (1970).

In sum, this civil appeal should be dismissed because of the failure to conform with Rule 12 of this Court.

2. THE APPEAL SHOULD BE DISMISSED BECAUSE THE FEDERAL QUESTION SOUGHT TO BE REVIEWED HAS NOT BEEN PROPERLY RAISED AND WAS NOT EXPRESSLY PASSED ON BY THE SOUTH DAKOTA SUPREME COURT.

Appellant brings this appeal under 28 U.S.C. 1257(2) which allows a review by this Court where drawn into question is the validity of a state statute on the

ground that it is repugnant to the Constitution, treaties or laws of the United States, and the decision is in favor of its validity. Appellant claims that a South Dakota statute violates certain provisions of the North Dakota-South Dakota Enabling Act. However, the South Dakota Supreme Court makes no such ruling in the case from which she appeals. See Kanaly II, supra. Nevertheless, the South Dakota Supreme Court has not been silent on the issue.

The State Supreme Court has clearly held in Kanaly I that the statute now challenged by Appellant did, indeed, violate the North Dakota-South Dakota Enabling Act. Thus, there is no decision in favor of the validity of the challenged statute vis à vis the Enabling

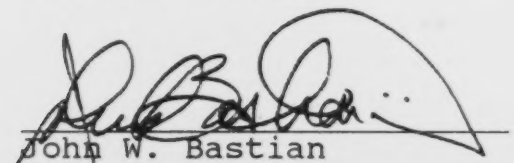
Act as alleged by Appellant and required by 28 U.S.C. 1257(2).

CONCLUSION

Based upon the foregoing argument and authorities, the appeal should be dismissed.

Respectfully submitted,

ROGER A. TELLINGHUISEN
ATTORNEY GENERAL



John W. Bastian
Assistant Attorney General
State Capitol
Pierre, S.D. 57501-5090
Telephone: (605) 773-3215

Counsel for Defendants
and Appellees

December 2, 1987

No. 87-720

THE SUPREME COURT OF THE UNITED STATES

October Term, 1987

ETHEL HAGEN,

Intervenor and Appellant,

vs.

DOUGLAS J. KANALY, et al.,

Plaintiffs and Appellees,

vs.

STATE OF SOUTH DAKOTA, etc., et al.

Defendants and Appellees,

CERTIFICATE OF MAILING

The undersigned, a member of the Bar of the above-captioned Court, hereby certifies that forty (40) copies of the Defendants and Appellees' Motion to Dismiss in the above-entitled case, were filed with the Supreme Court of the United States, Mr. Joseph F.

Spaniol, Jr., Clerk, by mailing the same by United States mail, first class, postage prepaid, to the Supreme Court of the United States, Washington, D.C., 20543, and three (3) copies of said Motion to Dismiss to Mr. Steven M. Johnson and Ms. Celia Miner, Attorneys at Law, 200 West Third, P.O. Box 735, Yankton, South Dakota, 57078-0735, on the 2nd day of December, 1987.

John W. Bastian
Assistant Attorney General
State Capitol
Pierre, S.D. 57501-5090
Telephone: (605) 773-3215

Kanaly I, we concluded that S.B. 221 would not violate Article VIII, § 7 for the full value of the property and interest transferred to the Board of Charities and Corrections. This has been done. Intervenor now suggests that S.B. 221 violates Article VIII, § 8 of the South Dakota Constitution. However, § 8 of the Constitution is simply a companion section to § 7. Therefore, because of our decision in Kanaly I, there is not now any constitutional question remaining with regard to § 8.

[1] Intervenor next contends that the Springfield campus became a dedicated educational institution on its acquisition and could be utilized for no other purpose. Intervenor relies primarily upon Patrick v. Blake, 70 S.D. 494, 19 N.W.2d 220 (1945). In Patrick, this court ruled that when a private citizen dedicates his property for a public use and the state accepts the grant, the property can be used only for the pur-

pose to which it has been dedicated. 70 S.D. at 501, 19 N.W.2d at 223. The present case is easily distinguished from Patrick, however. Here, the warranty deed from John A. Burbank by which the state acquired the land for the Springfield campus contained no restriction or reversionary clause such as that present in the deed involved in Patrick. 70 S.D. at 497-498, 19 N.W.2d at 222. Accordingly, we reject Intervenor's contention.

[2] Finally, Intervenor claims that S.B. 221 violated the due process clauses of the state and federal constitutions. These claims are unsupported by an relevant authority and are contrary to law and fact. The failure to cite supporting authority is a violation of SDCL 15-26A-60(6) and the issue is thereby deemed waived. Kelly v. Kirk, 391 N.W.2d 652 (S.D. 1986); Corbly v. Matheson, 335 N.W.2d 347 (S.D. 1983).

We again reaffirm the disposition of the constitutional claims made with respect to S.B. 221 and affirm the trial court's order dismissing Intervenor's second amended complaint.

HEEGE, Circuit Judge, for MILLER, J., disqualified.